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December 13, 2018

Hon. Daniel E. Shearouse
Clerk of Court
1231 Gervais Street
Supreme Court of South Carolina
Columbia, SC 29201

Re: Daufuskie Island Utility Company, Inc., Appellant, v. South Carolina Office of Regulatory Staff, et al., Respondents
Appellate Case No. 2018-001107

Dear Mr. Shearouse:

Enclosed please find Appellant's Initial Reply Brief and Proof of Service. This Brief is filed in accordance with the Court's Order in this matter dated December 4, 2018.

Please let me know if you require anything further from our office at this time.

Yours very truly,

Thomas P. Gressette, Jr.

c: Hon. Jocelyn Boyd
David Butler
Andrew M. Bateman and Jeff Nelson
John J. Pringle, Jr. and John F. Beach

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STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2018-001107

Daufuskie Island Utility Company, Inc., ... Appellant,

v.

South Carolina Office of Regulatory Staff,
Haig Point Club and Community Association, Inc.,
Melrose Property Owner's Association, Inc.,
Bloody Point Property Owner's Association, and
Beach Field Properties, LLC, ... Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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DAUFUSKIE ISLAND UTILITY CO., INC.

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A. Neither of Respondents' Briefs provides validation for the Order on Rehearing's exclusion of every single invoice of the $542,978 in documented Rate Case Expenses of Guastella Associates, particularly when at the initial hearing ORS advocated for and the Commission approved recovery of a portion of these same expenses.

DIUC originally anticipated it would incur rate case expenses totaling about $380,000 in conjunction with the current 2014 Application for Adjustment in Rates. However, the Application and rates prepared by DIUC's manager, Guastella Associates ("GA"), sought to recover only $191,000 for Rate Case Expenses.[1] Because DIUC's owners were willing to absorb 50% of the anticipated 2014 rate case expenses, the Application's rates presented a significant and direct benefit to the ratepayers. ORS and the Intervenors rejected the $191,000 and demanded DIUC be limited to only $75,000, which was only 20% of DIUC's originally anticipated rate case expenses.[2]

To date, this Application's proceedings have included extensive initial discovery, the 2015 evidentiary hearing, the very complex prior appeal, multiple motions and briefings so DIUC could collect rates under bond in order to avoid loan defaults pending the first appeal, a favorable decision from this Court with remand instructions, more discovery on remand at the request of ORS and the Intervenors, further bonding costs to collect sufficient rates pending the rehearing, a complete *de novo* rehearing trial, and now a second appeal. At rehearing, DIUC's actual rate case

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[1] DIUC only sought $10,000 more than the $181,900 it sought in its 2011 rate filing. (Brief at 13) (citing Hear Tr. 181)

[2] Had ORS and Intervenors accepted the DIUC proposal, it would have resulted in a tremendous savings to the ratepayers. (Rehearing Tr.p.34) ("[T]he requested $191,200 was ... much lower than the actual costs of the highly contested rate case which totaled $450,000 [before the later appeals and remand costs].")

expenses incurred as of September 30, 2017, including projections to complete the rehearing process for legal and consulting services, totaled $794,201.17, plus the additional $60,781.56 DIUC incurred for the bonds necessary to keep the utility open through the first appeal and then rehearing. (Rehear Tr 76) (Brief at 16)

DIUC could not afford to absorb these staggering rate case expenses. So, on remand DIUC updated its Application to include three-year amortization of the $60,781.56 paid for bonds and total Rate Case Expense of $794,210. (Rehear Tr 76; Rehear Tr. p. 473, ll. 15-17). In response, ORS totally reversed its previous position and announced for the first time that every single rate case expense for GA's services should be excluded. For the first time ORS recommended a wholesale exclusion of $542,978 of DIUC's incurred rate case expenses. (Rehear Tr.476; DIUC Brief at __)

ORS's new position relied upon the testimony of Dawn Hipp who testified about applying new criteria to analyze the GA costs; however, Hipp conceded there was no public notice of these novel "standards," that they were not published standards, and that ORS did not allow DIUC the usual "back and forth with the company, to make sure we thoroughly understand the expenditures for which they're seeking recovery." (Rehearing Transcript at 519-520; Brief at 18-20) Then, even though it is undisputed that GA personnel prepared the entire 2014 Application and accompanying schedules, that GA responded to the hundreds of information and discovery requests, that GA prepared and presented testimony at both hearings and was otherwise integrally involved in every aspect of proceedings on the Application from 2014 to 2018, ORS convinced the Commission to adopt its last-minute position rejecting all GA invoices.[3]

[3] The Order on Rehearing adopted the ORS position and deferred a final answer on the GA costs to a later case. (Order 2018-68 at 39) ("[W]e will allow the Company to request approval of

As set forth in Appellant's Brief, ORS admitted three essential flaws in its position that require reversal of the Commission's Order on Rehearing that adopted it:

> 1. The ORS recommendation to reject $542,978 of GA invoices is not the result of the usual process whereby ORS engages with the applicant to resolve questions and formulate a thoroughly vetted recommendation (Rehearing Transcript at 519-520);
>
> 2. The new "guidelines" applied by ORS on remand to reject all the GA invoices were never provided to DIUC, they are not published, and they are not available online nor part of any industry standard. Utilities cannot identify these "guidelines" unless they ask during the "give and take" exchange that ORS testified it did not provide to DIUC in this case (Rehearing Tr. 520; App. Brief 17-18); and
>
> 3. When DIUC challenged ORS for changing its position on remand, ORS retreated claiming it was rushed by the rehearing timetable and that is DIUC's fault. However, the rehearing schedule was not a convenience to DIUC; it was necessary because the bonds allowing DIUC to stay open were to expire on 12/31/2017 (Mt. Recon Dir. 2017-59 and 60; Directive 2017-61).

These admissions demonstrate the ORS position and the Order on Rehearing's adoption of it unreliable, arbitrary, and unsupported by substantial evidence.

Rather than addressing the Order's shortcomings and the lack of evidence in the record to support its result, the ORS Brief boldly asserts that ORS's recommendation to exclude the GA invoices should be sufficient for the Commission and this Court. (ORS Brief 26) Specifically, the Brief states:

> ORS utilized its significant experience to formulate a recommendation of allowable rate case expenses that it deemed reasonable and in the public interest. S.C. Code Ann.§§ 58-4-10(8) and 58-4-50(A)(l) (2015). Inherent in ORS's recommendation was its judgment stemming from expertise and experience as the state of South Carolina's sole utility regulation investigatory agency.

(Brief 26) However, it is not enough for ORS to simply refer to its statutory authority and ask this Court to ignore the inherent contradiction between positions asserted by ORS within this same

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these expenses in its next rate case, if it can provide supporting information for its invoices that satisfy the criteria listed by ORS witness Hipp presented at the rehearing.")

proceeding, particularly given the admitted shortcomings of the ORS position and the Order adopting it. It is also not enough for ORS to claim that its experience and expertise are sufficient for the Court to rule in its favor on issues just because ORS says so.

ORS further seeks to justify the Order's allowance of only $75,000 in rate case expenses by claiming that "DIUC previously agreed to seek $75,000 in Rate Case expenses in its most recently approved previous rate case." (ORS Brief 26) That claim is simply untrue. DIUC never sought rate case expenses of only $75,000 in the last rate case. The 2011 rate case's settlement agreement does not even mention an allowance for Rate Case Expenses. (R.p. 76)

1. ORS's purported concerns about the GA invoices do not provide substantial evidence to support the Order on Rehearing's conclusion to exclude all GA rate case expenses.

Attempting to defend the Order on Rehearing, both Respondents' Briefs cite the testimony of Dawn Hipp and her explanation of the asserted "shortcomings" of the GA invoices. This is the same testimony the Order on Rehearing cited. However, the findings and conclusions of the Order are simply not supported by substantial evidence; the Order should be reversed and the requested GA rate case expenses should be included within DIUC's Rate Case Expenses.

An order of the Public Service Commission will be affirmed by this Court if, and only if, the order is "supported by substantial evidence." S.C. Energy Users Comm. v. S.C. Public Service Comm'n, 388 S.C. 486, 490, 697 S.E.2d 587, 589 (2010); see also Utilities Services of S.C., Inc. v. S.C. Off. of Reg. Staff, 392 S.C. 96, 103, 708 S.E.2d 755, 759 (S.C. 2011). This Court has further explained:

> We have defined "substantial evidence" to mean "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' ... This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

Hamm v. S.C. Pub. Serv. Comm'n., 309 S.C. 295, 299, 422 S.E.2d 118, 120 (1992) (citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 135-36, 276 S.E.2d 304, 307 (1981).

The reasons in the record provided by ORS to reject the GA invoices are simply not reasonable, plausible, or adequate to support the asserted conclusion. For example, the idea that GA invoices should be rejected because the GA travel expenses *could* have included outrageous overspending is simply ridiculous. It is clear that ORS did not really have a concern that travel costs of on average of $1,450 each for the three hearing witnesses to fly to Columbia, obtain transportation to/from the airport, spend at least two nights required by the two-day hearing, and purchase 6 or more meals for each person over the 3-day travel period might have been hiding the "lavish expenditures related to employee travel (i.e. private jets, $50 alcoholic drinks)" that ORS implausibly claims it was worried *might* have been hidden in those costs. (Rehear Tr. 488)

Evidence must also be plausible in order for a reasonable mind to determine the same is adequate to support the conclusion. See Porter v. S>C. Public Serv. Commission, 333 S.C. 12, 23, 507 S.E.2d 318, 324 (1998)(citing Hamm v. S.C. Pub Serv. Comm'n, 309 S.C. 295, 422 S.E.2d 118 (1992)(Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.). No reasonable mind could conclude that the GA invoices were actually hiding —or even *could* be hiding— the kind of outrageous expenses alluded to by Ms. Hipp. Equally insufficient to justify the alarm alleged by ORS were the ORS allegations that the GA invoices should be rejected for no employee names on bills (ORS wanted names instead of GA employees' titles like "President" that correspond to specific rates), and no ability to know the period when consulting services were provided (when, in fact, all bills were on GA's letterhead, dated with the months of service and hours of the employees' titles, along with descriptions of the work performed each month) and there was no mathematical error (ORS bases this on one clerical

typo on one invoice that used a $35 hourly rate instead of $350 rate, actually resulting in a lower cost to ratepayers). The Appellant's Brief specifically and in detail addressed why the ORS assertions are insufficient to lead a reasonable mind to the Commission's ruling. (DIUC Brief at 22 to 33)

This Court should not affirm a Commission order that merely parrots ORS conjecture and pandering about the unsubstantiated, irrelevant what-ifs and maybes of corporate malfeasance that may, or may not have, occurred in some other instance totally beyond the record of this case.

2. DIUC was not permitted ample time to gather data to respond to the ORS critique of the GA invoices, which ORS raised for the first time during the rehearing after remand.

This Court has clearly ruled that "consistent with its obligation to provide [the utility] an opportunity to achieve a reasonable return, the PSC is obligated to accord [the utility] a meaningful opportunity to rebut the evidence presented in opposition to its proposed rates." Utilities Services of S.C., Inc. v. S.C. Off. of Reg. Staff, 392 S.C. 96, 107, 708 S.E.2d 755, 761 (2011) (citing 26 S.C. Code Ann. Regs. 103–845(C)). That means that without question when the Commission evaluates evidence of a challenge to proposed costs for inclusion in a rate case, the Commission "must give an applicant an appropriate opportunity to gather data in response." Id. at 109, 762

The Respondents' Briefs fail to provide any persuasive support to contradict the record's clear evidence that DIUC was not afforded ample time to respond to ORS's brand new position in its surrebuttal testimony on remand advocating for the exclusion of $542,978 of DIUC's incurred rate case expense. In briefing the issue ORS cites to Rehearing Exhibit 10, Hipp Surrebuttal Exhibit DMH-1, as ORS's explanation of its position and then goes on to allege that "DIUC never provided or offered additional information nor rebuttal evidence put forth by ORS, despite opportunities." (ORS Brief pp. 27-29) That statement is exactly what is wrong with the

Commission's Order.

On remand for the very first time ORS witness Hipp asserted all GA invoices should be rejected; however, no specifics were provided. DIUC attempted to respond via the Rebuttal Testimony of John Guastella. Then, on December 5, 2017, less than 48 hours before the rehearing began on December 7, 2017, ORS provided Hipp's Rehearing Surrebuttal Exhibit DMH-1 (admitted as Rehearing Exhibit 10), which was the first notice to DIUC of the particular reasons ORS claimed for rejecting all GA rate case expenses. The ORS Brief confirms this:

> During her testimony ORS witness Hipp specifically cited a number of invoices that were insufficient for reasons varying from lack of detailed description of work performed to mathematical errors. Additionally, ORS witness Hipp attached an exhibit detailing the problems with each invoice for which ORS recommended an adjustment.

(ORS Brief at 28) (internal citations omitted)

It is important to note that ORS's particular "concerns" about GA's invoices would have been evident from the face of the GA invoices for the entire duration of this rate case, yet ORS did not decide these were fatal "deficiencies" until two days before the evidentiary hearing on remand. Reasonable minds could not disagree. DIUC was not provided "an appropriate opportunity to gather data in response" to ORS. The Commission erred by relying on ORS's last-minute, entirely new reason for rejecting DIUC's rate case expenses that was not based on any regulatory standard, ignored that the expenses were actually incurred, and prevented DIUC from having an adequate opportunity to respond.

B. This Court did not intend its instructions on remand or its ruling as to Parker v. S.C. Pub. Serv. Comm'n, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986), to provide ORS an opportunity on remand to alter its position on DIUC's Rate Case Expenses by relying on a newly articulated set of "standards" that produces an entirely different result than what ORS advocated in the original hearing.

When this Court reversed the Commission's adoption of the ORS-Intervenors' Settlement

Agreement and remanded the matter "for a new hearing as to all issues," the Court also addressed the applicable scope of remand in such circumstances:

> Furthermore, we take this opportunity to overturn *Parker*.... We now hold that a remand to the Commission for a new hearing necessarily grants the parties the opportunity to present additional evidence. Rate cases are heavily dependent upon factors which are subject to change during the pendency of an appeal, thus it serves no purpose to bind parties to evidence presented at the initial hearing which may no longer be indicative of the current economic realities on remand.

Daufuskie Island Util. Co., Inc. v. S.C. Off. of Reg. Staff, 420 S.C. 305, 316, n.8, 803 S.E.2d 280, 286 (2017). Relying on this ruling as to Parker after remand ORS named a new witness who announced that ORS would be reversing its previous recommendation that DIUC be permitted to recover rate case expenses for the efforts of GA. (Hipp, Tr. 474).

This is surely not the result this Court intended when it held that "a new hearing necessarily grants the parties the opportunity to present additional evidence." When ORS loses on appeal and the case is remanded, ORS should not be allowed to revisit evidence already in the record and reverse its position to the detriment of the Applicant. To allow otherwise, as the Commission did in this case, would be to allow ORS to punitively respond when an Applicant succeeds on appeal.

The Commission misapplied this Court's instructions regarding Parker and therefore the Order on Remand is premised upon an error of law requiring reversal.

C. DIUC has demonstrated the Commission failed to properly apply the presumption of reasonableness to DIUC's Rate Case Expenses.

All three parties agree that a utility's expenses are presumed to be reasonable and incurred in good faith. See Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 109, 708 S.E.2d 755, 762 (2011)). However, "if an investigation initiated by ORS ... yields evidence that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures." Id. at 110, 763. That means the ORS "investigation" must yield evidence of

imprudence and that evidence must be presented to the Commission before the presumption of reasonableness is overcome requiring the utility to further support its filing. That is not how the Commission applied Utils. Servs. on rehearing of this case.

In Utils. Servs. the applicant (Utilities Services of South Carolina, Inc. or "US") sought to increase its rates to include capital improvement expenditures of $3 million incurred by US for "plant additions" since its last rate case. During public hearings on the application multiple residents testified regarding their unhappiness with the service and quality of water provided by US. Also, "customers from eleven neighborhoods testified they had not seen any capital improvements and/or improvements in water quality since the last rate increase." Utils. Servs. at 102. At the Commission hearing, a witness for US "listed the types of capital improvements [US] had made ... but he did not specify which of these improvements had occurred since the last rate increase." Id. On appeal of the Commission decision denying the requested rate increase, this Court held that the customer testimony could have been sufficient to "raise the specter of imprudence" regarding "expenditures that Utility claimed to have incurred in neighborhoods where customers alleged no improvements were made." Id. at 113, 764.

In this case, however, there was no such "imprudence" raised by testimony or otherwise. Neither Respondent has asserted and the Commission did not find that DIUC has in any way been untruthful or that DIUC has engaged in any "imprudent" behavior. Without evidence supporting an alleged imprudence, the presumption cannot be overcome. The Commission did not require the Respondents to meet their burden of raising "the specter of imprudence." Therefore, the Order is based on an error of law requiring reversal.

D. DIUC's request on remand to recover rate case expenses of $269,356 for Guastella Associates fees incurred through September 30, 2017, is supported by the evidence and circumstances of this proceeding.

Due to the unique procedural posture of this matter and the amount of time that passed during the first appeal and rehearing, the rate increase needed by DIUC is higher than the amount noticed to the public in 2015. (Rehear Tr.pp.79-80) To keep its new rates within the Application's original 108.9% increase noticed to the ratepayers, DIUC proposed to leave outstanding that portion of its rate case expenses beyond those that could be included within a 108.9% increase. (Proposed Order and Pet. For Recon.) DIUC therefore asked the Commission on reconsideration to correct the $699,631 excluded from Utility Plant In Service (see Section II, infra) and to increase the allowed rate case expense so that DIUC can recover $269,356 for GA fees incurred through September 30, 2017. (DIUC Pet. for Recon. p.22) That would leave outstanding about one-half of the $542,978 of GA fees invoiced through September 30, 2017, or $273,662. DIUC also asks that this Court do the same in conjunction with instructing the Commission to correct the erroneous exclusion of $699,631 in Rate Base/Plant In Service and permit remaining GA fees invoiced could to be presented for consideration as part of DIUC's next rate proceeding. (App. Brief at 45-46)

The ORS Brief asserts this request is somehow improper or would result in an arbitrary decision. (ORS Brief at pp.28-29) However, as the record demonstrates, there is ample support for these costs and the Order on Rehearing denies recovery for GA's actions which the Commissioners themselves witnessed.

The Order's exclusion of the entire $542,978 of rate case expense incurred since 2014 is punitive, arbitrary, and an abuse of discretion; it denies facts known and documented in the Commission record and facts actually witnessed by the Commissioners themselves. See Smith v. S.C. Ret. System, 336 S.C. 505, 523, 520 S.E.2d 339, 349 (Ct. App.1999)("An abuse of discretion occurs where the trial court is controlled by an error of law or where the Court's order is based on factual conclusions without evidentiary support."); see also Deese v. S.C. State Bd. Dentistry, 286

S.C. 182, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985)("A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.")

The Commission's refusal to allow DIUC to recover for any GA rate case expenses is contrary to the testimony, is not supported by the record, and it defies what the Commissioners themselves have witnessed. The ruling is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record and it borders on an abuse of discretion.

II. THE PUBLIC SERVICE COMMISSION'S FINDINGS AND CONCLUSIONS IN ITS ORDER ON REHEARING EXCLUDING FROM RATE BASE $699,631 OF USED AND USEFUL UTILITY PLANT IN SERVICE WERE LEGALLY ERRONEOUS, ARBITRARY, UNSUPPORTED BY SUBSTANTIAL EVIDENCE, AND PREJUDICED SUBSTANTIAL RIGHTS OF DIUC.

A. The Commission excluded $699,631 of DIUC's Rate Base/Utility Plant in Service based upon an unsupported adjustment that ORS "carried forward" from 2011 paperwork. ORS admits it failed to conduct any research or analysis of the $699,631 "carried forward" and the record includes no factual basis explaining the $699,631. The Commission erred by incorporating the $699,631 reduction into the Order on Rehearing.

In response to DIUC's 2011 Application for Approval of Water and Sewer Rates, someone working for ORS at the time recommended that DIUC's Rate Base should be reduced by $1,624,696 because of what that employee called "non-allowable" amounts. Because the parties resolved the 2011 case by settlement, that 2011 proposed "non-allowable" adjustment was never analyzed in any order of the Commission. In fact, as part of that settlement, the parties stipulated to a $5,000,000 Rate Base; the settlement agreement also provided that the $5,000,000 negotiated Rate Base would "not be binding in future proceedings, instead those proceedings will be determined based on the evidence presented in each docket and the applicable law." (Settlement Agreement, R.p.77) (adopted by Commission Order No. 2012-515, R.p.68)

In 2014 DIUC filed the current Application proposing a total rate base of $7,085,475 for its combined water and sewer operations. (Order 2015-846 p.14). In response to the 2014 Application, ORS chose not to use the $5,000,000 rate base amount from the settlement in Docket No. 2011-229-WS. (Id. at 17, n.18) Instead, "ORS used the carryforward rate base from the last rate case in Docket No. 2011-229-WS, $4,615,755,...." (Id. p. 17)(citing Gearheart Direct, R. p. 496). ORS went back to its 2011 figure for rate base but never explained the basis of that amount.

At the first hearing in this case in 2015 ORS witness Ivana Gearheart testified the previous deductions from the DUIC rate base "were simply carried over from the [2011] rate case" but admitted she did not analyze the numbers because she "wasn't part of that [2011] case." (Hearing Tr. 526) When challenged at the 2015 hearing about the *actual* reasons that why ORS was recommending a $4,615,755 rate base instead of DIUC's calculated $7,085,475 rate base, Gearheart could only state that "ORS's procedure for calculating plant-in-service is to roll forward plant-in-service from the last rate case." (Hearing Tr. 524) That "carry over" resulted in a Commission Order on rehearing that relies on a seven-year-old adjustment without one but of support in the record of this case.

In response to the current 2014 Application, ORS via Gearheart restated the 2011 ORS conclusion about "undocumented costs" in DIUC's rate base and admitted she did nothing to evaluate the adjustment. She testified:

Q	The adjustment that you made said "undocumented costs," I think, or something like that, did it not?
A	[GEARHEART] Yes, it did.
Q	And what research did you do to determine documentation of those costs of that plant-in-service?
A	[GEARHEART] Those adjustments were simply carried over from the last rate case, and we do not retest or retry anything that was approved in the last rate case.

(Tr. p.526) In other words, ORS's position is based completely on the fact that in 2011 an ORS

staff member recommended an adjustment which DIUC disputed and which was never resolved because the 2011 case was resolved by a settlement. Then, when DIUC applied for a rate increase in 2014, ORS just copied over the 2011 adjustment without any analysis or research.

At the 2017 rehearing ORS revised its position to include the Elevated Tank Site per this Court's instructions. However, ORS continued to "carry forward" the rest of the 2011 reduction to exclude $699,631 worth of plant from DIUC's Rate Base. Gearheart did not testify at rehearing. Instead, ORS presented Dawn Hipp, Director of Utilities Rates and Services for the Office of Regulatory Staff. However, Hipp made no changes to and wholly adopted the prefiled testimony of Gearheart. (Hearing Tr. 435) ORS witness Daniel Sullivan also adopted the testimony of Gearheart; Sullivan, like Hipp, did not further explain any reasoning for the $699,631 that Gearheart copied from the 2011 file. (Rehear Tr. 443 and 451)

Relying solely upon Hipp and Sullivan's incorporation of Gearheart's blind "carry forward" of the adjustment ORS proposed in the 2011 DIUC rate case, the Order on Rehearing excluded $699,361 of DIUC's gross plant in service. The Commission's finding and conclusion were not supported by any valid factual basis for excluding this plant. Instead, the Commission made only the conclusory statement that the $699,631 adjustment was for "non-allowable plant, adjustments from the previous case not carried forward by DIUC in this Application, and asset retirements." (Order on Rehearing at 26) This is reversible error.

The Commission did not have sufficient evidence to justify the exclusion of $699,631 of items never specifically identified from DIUC's Rate Base. The decision is therefore arbitrary, capricious, based upon unwarranted exercise of discretion, and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. See Deese v. S.C. State Bd. Dentistry, 286 S.C. at184-5, 332 S.E.2d at 541.

B. There is no factual or legal basis for Respondents' arguments that the Order's $699,631 reduction of DIUC's Rate Base/Utility Plant In Service is justified by DIUC's 2011 case or Utils. Servs. of S.C. v. S.C. Off. of Reg. Staff, 392 S.C. 96, 708 S.E.2d 755 (2011).

In an attempt to convert Gearheart's testimony into something substantive regarding the 2011 case, the ORS Brief relies heavily on an assertion that Gearheart's carry forward of an unexplained 2011 ORS position is a proper "baseline" for this case.

> Using the previous case as a baseline or starting point is intuitive, practical and allows consistency and continuity for ORS in carrying out its statutory duty to provide recommendations to the Commission with respect to proposed rates. It additionally provides certainty and an understandable baseline for the Commission-regulated utilities.

(ORS Brief at 36) The problem, of course, is that in the current case because there is no testimony in the record about the 2011 case or what was supposedly analyzed by ORS in 2011, the Order adopting the ORS position provides absolutely no clarity, consistency, or continuity. "Carrying forward" is completely unreliable in this instance because neither ORS's previous calculations were not tested or approved in the 2011 rate case and no factual basis was provided in the record of this case to support the position ultimately adopted by the Commission.

Furthermore, the parties specifically agreed that rate base in cases after 2011 would be determined by the evidence presented in those future cases:

> The Parties agree and stipulate that DIUC shall be allowed to set rates and charges on a rate base of $5,000,000. **This stipulated rate base shall not be binding in future proceedings, instead those proceedings will be determined based on the evidence presented in each docket and the applicable law.**

(R.p.77) (emphasis added) There has been no evidence presented in this docket as to the basis of the 2011 ORS exclusions from rate base. Because the 2011 case was settled and there were no terms in the settlement confirming what ORS did or did not do, the filings from that case are not a proper "baseline" for evaluating the instant 2014 Application.

Intervenors' Brief mistakenly asserts that the Order on Rehearing did not need to identify the $699,631 worth of items being excluded from DIUC's rate base because "DIUC did not verify those assets in Docket No. 2011-329-WS,and did not justify their inclusion in rate base at that time." (Int. Brief p. 10) First, that is just an ORS opinion of how DIUC responded in 2011; there was no Commission finding in the 2011 case. Second, the parties agreed by settlement that the rate base in the next DIUC case (this 2014 Application) would be "determined based on the evidence presented" in this docket. (R.p. 77) Third, there is absolutely no testimony in the record regarding what analysis ORS did (or did not) complete in the 2011 case and there is nothing in the record that supports a conclusion that DIUC did not justify the items in its rate base. The only testimony on that issue in the instant case was from Gearheart, and she did not know what was done in the previous case. (Hear Tr. 526) Without any proof as to what plant ORS excluded and why, DIUC had no opportunity to respond to the unsubstantiated adjustment proposed by ORS.

ORS asserts Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 109, 708 S.E.2d 755, 762 (2011), supports the ORS position because that case states that the Commission can use a previous rate case as a starting point for analysis. Actually, however, the Court held:

> Our case law suggests that a previous rate increase may provide a baseline for the PSC to use in determining whether a utility has incurred additional expenses requiring additional revenue. Cf. Heater of Seabrook, Inc. v. Public Service Comm'n of S.C. (Heater of Seabrook I), 324 S.C. 56, 61, 478 S.E.2d 826, 828 (1996) ("To show that its expenses have increased, Heater need only introduce data comparing the expenses from the test year used in the previous rate case with those from the test year in this case....").

Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 114, 708 S.E.2d 755, 765 (2011). Utils Services addresses the premise that the Commission may consider a previous rate decision to determine whether the utility's expenses have increased in the interim. That necessarily requires a *finding* or a *decision* in the previous case and there was no finding and no decision in

the 2011 DIUC rate case; it was settled by agreement. (Order 2012-515) Also, even if a decision was not required, clearly Utils Services does not hold that ORS's positions from a previous case are automatically sufficient factual basis for adjustments and findings in a later rate case.

C. Respondents cannot correct the fact that Rehearing Exhibit 8 and the Order on Rehearing do not identify the specific items of plant that the Order on Rehearing excluded from Rate Base/Utility Plant In Service.

The Order on Rehearing states that Rehearing Exhibit 8 "shows the specific items composing the $699,361" that were excluded as "non-allowable plant, adjustments from the previous case not carried forward by DIUC in its Application, and asset retirements." (Order on Rehearing at 26) However, that is not what the Exhibit shows. (See App. Brief at 25). Nowhere does the one-page Audit Exhibit DFS-5 (admitted as Rehearing Exhibit 8) identify a single specific item of plant – it only shows the NARUC plant "accounts" identified by a general "description." The Exhibit is not a listing of *specific* plant items, it is a listing of *accounts* of plant items. See (Highlighted Copy of Ex. Attached to DIUC Reply to ORS Answer re Pet for Recon) "Accounts" in this instance is a descriptive term for a *category* comprised of hundreds of items; it is not an identification of *specific* items. The record is void of, and therefore the Order lacks, any factual basis to identify, for example, which meter(s) or main(s) from the category "Water and Sewer Mains" is/are being excluded for what reason.

Attempting to address this deficiency, the ORS Brief states:

> The DIUC Application statement of plant investment listed general categories for both water and sewer. Those categories are in its depreciation schedule. ORS's adjustments for Plant in Service correspond to those plant categories listed in DIUC's Application, and ORS used the list of Plant in Service categories in DIUC's Application to show adjustments.

(ORS Brief at 40 (internal citations omitted)

ORS's argument is in effect regulatory double talk. Depreciation is not the same thing as

Utility Plant In Service. Depreciation is calculated on a group method that applies depreciation rates to the totals for each account. Depreciation is not applied differently to each item of plant *within* the account. ORS reduced the DIUC Plant In Service to exclude amounts based presumably on specific items, but never identified which items. The total was just reduced without an explanation of the items within the account that justified the reduction. Rehearing Exhibit 8 only shows the categories that were reduced. The Exhibit and therefore the Order do not identify which items within those categories are being "carried forward" from 2011 and excluded by the Order.

ORS failed to give the Commission a sufficient record and contrary to the Order's statement, Rehearing Exhibit 8 does not identify specific items of plant, the specific cost of the items being adjusted is not provided, and there is no information about ORS's reasons for the adjustments. The Order on Rehearing's reliance on Rehearing Exhibit 8 is misplaced and it fails to demonstrate substantial evidence to support its conclusion. See Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 23, 507 S.E.2d 318, 324 (1998)(citing Hamm v. S.C. Pub. Serv. Comm'n, 309 S.C. 295, 422 S.E.2d 118 (1992)(Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.) DIUC's Rate Base/Utility Plant In Service should include the $699,631 disallowed by ORS's carry over of the unsubstantiated numbers from the 2011 paperwork.

D. DIUC's unrebutted proof of the cost of the known plant items in accordance with NARUC standards is substantial evidence of their cost and was sufficient, if not conclusive, documentation of their value in the absence of contrary proof of their value. The Commission erred by reducing DIUC's Rate Base/Utility Plant in Service.

At the original hearing and at the rehearing, ORS asserted some unidentified portion of the 2011 carry-forward adjustment to utility plant was based on the alleged absence of specific contemporaneous documentation of the precise cost of construction of facilities. John Guastella testified, however, that the absence of those invoices does not constitute a lack of documentation

of cost for ratemaking when there is no question the facilities are in service, used and usable, as is the case here. (Hear Tr. p. 150-152) ORS and the Intervenors have never countered Guastella's testimony that the excluded plant is in service and used and useful to DIUC.

Now, on appeal, Intervenors attempt to resurrect this argument by asserting that the absence of cost invoices requires the exclusion of known plant even if it is undisputed that plant is in service. (Intervenors' Brief p. 12) The record demonstrates that DIUC had to take over the defunct Melrose Utility and that there was no paperwork beyond the books and records wherein these costs were recorded contemporaneously by the predecessor utility. That recorded information is, in fact, evidence that the items were booked contemporaneously by Melrose at the time of purchase. DIUC provided ORS with ample documentation, including itemized assets by primary plant account, description, original costs as booked, year of installation and in-service dates. (R.p.422, lines 16-p.424, line 25) Furthermore, it is not disputed that these items are actually in use within the DIUC system. The specific items can be located, seen, and assessed. Mr. Guastella also testified that it is consistent with the NARUC Uniform System of Accounts to estimate the cost of observable, in-use utility plant in the absence of documentation. (R.p.475, line 17-p.476, line 8) There is no better estimate than the contemporaneously booked values DIUC has provided to ORS and to the Commission where the precise invoices are unavailable.

The Commission also erred in its response to this issue. When pressed by DIUC's Motion for Reconsideration, the Commission Order Denying Rehearing stated:

> [T]he Company must provide proper documentation for such items in future proceedings, if it seeks approval of them. Such documentation can be provided by various sources, such as obtaining duplicate invoices from vendors, presenting cancelled checks as proof of payment, obtaining copies of cancelled checks from banking institutions when necessary, supplying copies of paid contracts, and/or obtaining independent third party estimates for questioned items.

(Order 2018-346 p. 6)

First, DIUC still does not know which specific items of plant have been excluded, so it does not know which of the hundreds of its plant items are included within the $699,631 carry-forward adjustment from 2011. Without that information, DIUC cannot do anything. Second, as the record also made clear, DIUC cannot, as the Commission suggests, obtain "duplicate invoices from vendors" for these transactions which took place sometimes over 10 years ago in a predecessor entity that abandoned its operation. When Melrose abandoned the people of Daufuskie, it did not leave behind bank records or "cancelled checks as proof of payment" and its files were in shambles. There were no "copies of paid contracts" that DIUC could have supplied to the Commission. Finally, if ORS had actually identified the specific items of concern, DIUC might have been able to obtain some third party's estimate for those items.

ORS did not submit substantial evidence to support the Order's finding and conclusion excluding from DIUC's Rate Base/Utility Plant In Service equipment totaling $699,631.[4]

E. DIUC has demonstrated the Commission failed to properly apply the presumption of reasonableness to values DIUC presented for its Rate Base/Utility Plant In Service.

The Order on Rehearing erroneously held that DIUC has not established a process for preparing accounting estimates that can be audited by an independent third party, such as the ORS, and therefore that DIUC was not entitled to the presumption that its utility plant costs are reasonable and were incurred in good faith. (Order at 6) Endorsing this error, the Intervenors' Brief asserts that the Order held "DIUC failed to verify (through invoices, estimates, or other reasonable method) certain plant values, and therefore those values are not even "known and measurable, much less presumed reasonable." (Brief at 8) To reach this conclusion, however,

[4] The record does not include any ORS testimony in support of excluding capital costs and legal costs associated with plant in service (i.e., the "Land and Land Rights" as shown in Rehearing Exhibit 8). (DIUC Brief at 42-45)

the Commission and Intervenors' have written into Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998) and Parker v. S.C. Pub. Serv. Comm'n, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986) additional requirements that DIUC must meet before it is entitled to the presumption that its asset values are reasonable and were incurred in good faith. The Commission's implementation of an additional requirement constitutes an error of law.

In Porter this Court confirmed that Southern Bell v. Pub. Serv. Comm'n of South Carolina, 270 S.C. 590, 602, 244 S.E.2d 278, 284 (1978) "requires [the] PSC to consider known and measurable changes that occur after the test year in order to accurately calculate figures that affect the company's overall rate of return and customer." Porter, 333 S.C. 12, 26; 507 S.E.2d 328, 335. In so considering the out-of-year information, the Commission in Porter explained in its reconsideration order that it had in that instance determined "it preferred to rely upon *audited* data" regarding salary and wage expenses. Id. (emphasis in original). However, on appeal this Court held that unaudited information and testimony presented to the Commission regarding the elements of rate base is not by definition "pure speculation" and that such unaudited information should not be automatically rejected.

In Porter this Court clearly ruled the Commission can certainly utilize unaudited data and testimony. The specific issue in Porter was what amount of income from a BellSouth subsidiary should be attributed to BellSouth in its rate base. Testimony and unaudited information from the Consumer Advocate demonstrated that the audited data was significantly lower. This Court reversed the Commission's decision that the out-of-year unaudited data and testimony was too speculative finding that the testimony contradicting the audited data was convincing. See Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 23, 507 S.E.2d 328, 333 (1998).

Likewise, here, the Commission should have at least evaluated the data and testimony

instead of flatly rejecting it as speculative. DIUC provided ORS with books and records wherein these costs were recorded contemporaneously by the predecessor utility and included itemized assets by primary plant account, description, original costs as booked, year of installation and in-service dates. (R.p.422, lines 16-p.424, line 25) Through Guastella's testimony, DIUC also provided the Commission with substantial proof sufficient to justify DIUC's position regarding the recorded data. The Commission's failure to even consider this evidence constitutes an error of law and the Order's finding contrary to the DIUC evidence is not supported by substantial evidence.

CONCLUSION

This Court should reverse or modify the Public Service Commission Order on Rehearing because the Order's findings and conclusions that DIUC is not entitled to recover any of the $542,978 in documented Rate Case Expenses of Guastella Associates and excluding $699,631 of used and useful Rate Base/Utility Plant In Service should be excluded from rate base were legally erroneous, arbitrary, unsupported by substantial evidence, and prejudiced substantial rights of DIUC.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2018-001107

Daufuskie Island Utility Company, Inc.,

Appellant,

v.

South Carolina Office of Regulatory Staff,
Haig Point Club and Community Association, Inc.,
Melrose Property Owner's Association, Inc.,
Bloody Point Property Owner's Association, and
Beach Field Properties, LLC,

Respondents.

PROOF OF SERVICE

I, Vicki A. Volponi, an employee of Walker Gressette Freeman & Linton, LLC, hereby certify that I have served this 13TH day of December 2018, Appellant's Initial Reply Brief on counsel of record, by placing same in the United States Mail, first class postage prepaid to the following:

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